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COURT OF CRIMINAL APPEALS
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Texas Court of Criminal Appeals

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COURT OF CRIMINAL APPEALS
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PD-0636-19

Michael Anthony Hammack, Appellant v.

State of Texas, Appellee

On Discretionary Review from the Sixth Court of Appeals
No. 06-18-00212

On Appeal from the 354th Judicial District Court, Hunt County
No. 32355CR

Appellant's Redacted Opening Brief

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I. Identity of Parties, Counsel, and Judges

Michael Anthony Hammack, Appellant

Jessica McDonald, attorney for Appellant on appeal and discretionary review

Toby Wilkinson, attorney for Appellant at trial

State of Texas, Appellee

Nobie Walker, Hunt County District Attorney

Hon. Keli M. Aiken. Presiding Judge, 354th Judicial District Court of Hunt County

Hon. C.J.. Morriss, III, Sixth Court of Appeals

Hon. J.J. Stevens, Sixth Court of Appeals

Hon. Ralph K. Burgess, Sixth Court of Appeals

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To the Honorable Judges of the Texas Court of Criminal Appeals:

Appellant Michael Anthony Hammack respectfully submits this Opening Brief:

IV. Statement of the Case and Jurisdiction

Hammack filed a petition for discretionary review in which he requested that this Court review the judgment and opinion of the Sixth Court of Appeals in *Hammack v. State*, No. 06-18-00212-CR, 2016, (*Hammack v. State*, 06-18-00212-CR, 2019 WL 2292334 (Tex. App.—Texarkana May 30, 2019, no pet. h.) (not designated for publication) (See Appendix A). This Court granted Hammack's petition for discretionary review on the following ground and requested Appellant present oral argument:

Ground 1: The Court of Appeals erred by finding that the evidence was legally sufficient to find Appellant guilty of interfering with child custody because the State failed to prove beyond a reasonable doubt that Appellant knowingly violated the express terms of a judgment or order when Appellant was never served the order, never saw the order, and never had the terms of the order explained to him in either open court or in any other manner.

On August 17, 2018, a grand jury indicted Appellant, alleging that on or about the 5th day of March 2018, Appellant did "intentionally or knowingly take or retain [1]D.H., a child younger than 18 years of age, when Appellant knew that said taking or retention violated the express terms of a judgment or order of a court

1. Initials are used to protect the minor child's name per rule 9.01(b) of the Texas Rules of Appellate Procedure

disposing of the child's custody, to wit: Order for Protection of a Child in an Emergency, signed by the judge of the 354th District Court of Hunt County, Texas, on or about February 27, 2018." (CR 5).

On December 5, 2018, after a trial by jury, Appellant was convicted of the offense as alleged in the indictment. (CR. 97). On May 30, 2019 the Court of Appeals affirmed the conviction in *Hammack v. State*, No. 06-18-00212-CR.

Hammack filed a petition for discretionary review. On November 6, 2019, this Court granted the petition for discretionary review and permitted oral argument.

V. Statement Regarding Oral Argument

In this Court's November 6, 2019 notice in which it granted the petition for discretionary review, the Court informed undersigned counsel that oral argument would be permitted. See Tex. Rule App. Proc. 68.4(c)(2014). The undersigned attorney is honored to present oral arguments at a place and time convenient to this Court.

VI. Grounds Presented

1. **The Court of Appeals erred by finding that the evidence was legally sufficient to find Appellant guilty of interfering with child custody because the State failed to prove beyond a reasonable doubt that Appellant knowingly violated the express terms of a judgment or order when Appellant was never served the order, never saw the order, and never had the terms of the order explained to him in either open court or in any other manner.**

VII. Introduction

Appellant has been convicted of violating an order with which he was never served, an order with which he was never provided a copy, and which no person ever explained the terms of the order to Appellant. In upholding this conviction with no evidence that Appellant had any notice of the contents of the order, the Court of Appeals has created a new avenue of prosecution, allowing that a person can be held criminally liable for violating a court order when they have had no notice of the terms of the order. Appellant contends that the Court of Appeals erred in finding the evidence legally sufficient to prove beyond a reasonable doubt that Appellant knowingly violated the express terms of an order as the record is crystal clear that Appellant was never informed in any manner of the express terms of the order he has been convicted of violating.

This Court is being asked to decide whether an adverse party's opinion that a Defendant *knew* the terms of an order he was never served, never shown, and never heard the terms announced in open court or otherwise, is enough to prove a person *knowingly* violated the express terms of a court order and be found guilty beyond a reasonable doubt.

VIII. Facts

A stipulation of evidence was entered into at trial in this case, which stated a valid court order was entered on February 27, 2018 giving the Texas Department of Family and Protective Services (CPS) sole managing conservatorship of the minor child, D.H. The stipulation further stated that as of the date of the Courts' Order, Appellant did not have a legal right to possess, take, or retain his minor child. However, the stipulation does **not** state that Appellant knew an order was in existence, was valid, or that he knew any of the terms of the order.

Testimony began on December 4, 2018. (RR 6). The State's first witness was Michael McAda, a detective with the Commerce Police Department. (RR 6, p. 17-18). McAda became involved in the case involving Appellant on March 8, 2018, when he learned that D. H. had escaped from CPS custody and was taken to Oklahoma where she married her boyfriend. (RR 6, p. 20).

Detective McAda testified that D.H. was the 16 year old daughter of Appellant. (RR 6, p. 34). Detective McAda testified that, in the course of his investigation, he learned that Appellant had taken his 16 year old daughter to Oklahoma and signed the necessary documents so that she could be married. (RR 6 p. 35).

On cross-examination, Detective McAda said that he did not find any documentation that would show that Appellant had ever been served with the court orders that are the subject of his criminal trial. (RR 6, p. 36-37). Detective McAda offered no evidence of any efforts made to have Appellant served with the documentation and gave no testimony as to any knowledge Appellant had of the court orders.

The State next called Officer Kelvin Rhodes with the Commerce Police Department. (RR 6, p. 38). Officer Rhodes became involved in the case when CPS requested assistance in locating a run-away juvenile. (RR 6, p. 39). Officer Rhodes testified that he went to the home of Appellant on February 27, 2018 and made contact with Appellant. (RR 6, p. 41). Officer Rhodes testified that, based on his conversation with Appellant on the evening of February 27, 2018, he believed Appellant knew that Daphney had been picked up by CPS. (RR 6, p. 42). Officer Rhodes testified that Appellant allowed him into Appellant's home and allowed him to search for Daphney. (RR 6, p. 42). Daphney was not located in Appellant's home. (RR 6, p. 42).

On cross examination, Officer Rhodes stated that he did not see any evidence that Appellant had ever been served with the court orders in this case. (RR 6, p. 48). Officer Rhodes did, however, testify that he believed Appellant had knowledge of the fact that CPS had custody of Daphney as of the time Officer Rhoades arrived at

Appellant's house. (RR 6, p. 51). However, Officer Rhoades gave no evidence, other than his opinion, to prove that Appellant had actual knowledge of any court orders. Further, Officer Rhoades gave no testimony as to whether or not Appellant had ever seen the orders or whether or not Appellant knew the express terms of the order.

Sgt Marcus Cantera, with the Commerce Police Department, offered testimony that he assisted CPS with the search for D. H. (RR 6, p. 55). (RR6, p. 54- 55). As Sgt. Cantera was searching the home of Daphney's grandmother he heard voices coming from the attic and saw Appellant who was half-in and half-out of the attic. (RR 6, p. 58). Sgt Cantera testified that Appellant became argumentative with him, stating that Sgt. Cantera had no right to be in the home. (RR 6, p. 59). Sgt. Cantera testified that it was his opinion, based on his interactions with Appellant, that Appellant knew CPS had custody of his daughter. (RR 6, p. 61). Like the other witnesses who testified, Sgt .Cantera had nothing, other than his opinion, to prove that Appellant had knowledge that an order even existed. Sgt. Cantera certainly gave no articulable facts or evidence to support what his opinion was based on and did not provide any evidence at all to show that Appellant was aware of the express terms of any court orders that existed.

Amber Davidson, was the investigator for the Texas Department of Family and Protective Services during the events relevant to this case. (RR 6, p. 67-68). Ms.

Davidson testified that D.H. was Appellant's 16 year old daughter. (RR 6, p. 69). Ms. Davidson made contact with Appellant and told him CPS had received a report regarding his family. (RR 6, p. 72). Ms. Davidson testified that Appellant was uncooperative with her and that she informed Appellant if he did not cooperate that she would obtain court orders. (RR 6, p. 73). Ms. Davidson stated that CPS did obtain an Order for Protection and a Writ of Attachment regarding D.H. (RR 6, p. 74). On February 27, 2018, after obtaining the writ of attachment, Ms. Hammack went to Commerce High School and took custody of D.H. and took her back to the CPS office. (RR 6, p. 81). Once back at the office, Ms. Davidson testified that she called Appellant and informed him that she had an order granting CPS custody of Daphney and that she had Daphney in her custody. (RR 6, p. 81). Ms. Davidson said Appellant's response was "that can't be possible." (RR 6, p. 82). Ms. Davidson did state that there was no doubt in her mind that Appellant knew CPS had a court order for custody of Daphney at the end of her telephone conversation with Appellant. (RR 6, p. 85). But Ms. Davidson's testimony also made it clear that she did not explain any of the terms or details of the order to Appellant.

After taken into CPS custody, Dapheny ran away from the CPS office. (RR 6, p. 85). Ms. Davidson testified that she and other CPS employees and police officers searched from Dapheny from February 27, 2018 through March 6, 2018. (RR 6, 9.

89). On March 6, 2018, Daphney was located at Appellant's home. (RR 6, p. 90). Ms. Davidson testified that Daphney reported that Appellant and her grandmother had transported her to Oklahoma so she could get married. (RR 6, p. 90).

Ms. Davidson conceded that the Department never had Appellant served with the order in this case. (RR 6, p. 94-95). Ms. Davidson testified that she never explained what was in the court order to Appellant. (RR 6, p. 97). Ms. Davidson also conceded that, if a person had not physically read a court order, and unless that order had been explained to them in detail, a person could not possibly know what was contained in said order. (RR 6, p. 94).

Rhonda West, CPS investigator, testified that she was present when Amber Davidson went to Appellant's residence on February 27, 2018. (RR 6, p. 137). Ms. West testified that there was no doubt in her mind that Appellant knew court orders had been issued regarding Appellant's daughter, Daphney, but she gives no facts or evidence to support her opinion as to why she believes that. (RR 6, p. 139). Ms. West further testified that Appellant was not served with a copy of the order and that the contents of the order were not explained to Appellant. (RR 6, p. 141-142).

IX. Summary of the Argument

The Court of Appeals erred by finding that the evidence was legally sufficient to prove that Appellant knowingly violated the express terms of a court order. The State failed to prove beyond a reasonable doubt that Appellant intentionally and knowingly (a) retained a child younger than eighteen years when he knew that his taking or retention violates the express terms of a judgment or order of a court disposing of the child's custody. Appellant was never served with the court order, never saw the court order, and was never told the express terms of the court order and cannot be found guilty beyond a reasonable doubt simply because of the adverse party's opinion of what they thought Appellant knew.

X. Opinion of the Court of Appeals

The Court of Appeals stated it is the State's burden to prove the element of knowledge beyond a reasonable doubt. The Court acknowledged Appellant was never served with the court orders. However, they determined that the combined testimony of the witnesses "suggested" appellant's knowledge of the terms of the order and his actions "at least" showed he participated in the child being secreted and the jury could "infer" he knowingly violated the terms of the order.

XI. Argument

Ground for Review 1: The Court of Appeals erred by finding that the evidence was legally sufficient to find Appellant guilty of interfering with child custody because the State failed to prove beyond a reasonable doubt that Appellant knowingly violated the express terms of a judgment or order.

The Court of Appeals erred in affirming Appellant's conviction as there was insufficient evidence to establish Appellant knew he was violating the express terms of a court order. Knowing is an essential element to the offense and the evidence is insufficient to prove he had formed the knowledge.

A person commits an offense if he takes or retains a child younger than eighteen years when he knows that his taking or retention violates the express terms of a judgment or order of a court disposing of the child's custody. *See* TEX. PEN.CODE ANN. § 25.03(a)(1) (Vernon 1994). To prove an offense, the person must have notice of the order. *Cf. Ramos v. State,* 923 S.W.2d 196, 198 (Tex.App.- Austin 1996, no pet.); *Small v. State,* 809 S.W.2d 253, 256 (Tex.App.- San Antonio 1991, pet. ref'd). At a minimum, the person must be "somehow aware of what he is prohibited from doing by a specific court order.... " *Cf. Small,* 809 S.W.2d at 256.

In *Small v. State*, the Court in San Antonio considered a similar issue. In *Small,* the defendant was convicted of violating a protective order with which, like the case at bar, the defendant had never been served. Reversing that conviction, the court held, "Unless a defendant is somehow aware of what he is prohibited from doing by a specific court order, he cannot be guilty of knowingly and intentionally

violating that court order. We hold that this is an essential element of this offense, and the State is required to prove that the appellant "knowingly and intentionally" violated the court order in question beyond a reasonable doubt." *Id.* at 256.

As alleged in the indictment and outlined in the Court's charge to the jury, a person commits an offense if the person takes or retains a child younger than 18 years of age when the person knows that such taking or retention violates the express terms of a judgment or order of a court disposing of the child's custody. In this case, the State wholly failed to prove that Appellant ***knew*** he was violating the ***express terms*** of a judgment or court order. In fact, the evidence presented by the State was undisputed that Appellant had never been served with a copy of the court order, never been provided a copy of the court order, and had never been told what was contained in the court order. While several of the State's witnesses said it was their opinion that Appellant knew an order existed, there is not a single piece of evidence to prove that Appellant had ever seen the court order or knew what the contents of the order were. In fact, the testimony from the State's witnesses seem to prove the fact that Appellant ***did not*** have knowledge of the contents of the order.

The testimony of the State's star witness, Amber Davidson provides further proof that Appellant did not have knowledge of the court order. Ms. Davidson was the only witness who testified that she told Appellant an order existed. While Ms. Davidson did testify she told Appellant she had an order granting CPS custody of

Daphney, Ms. Davidson further testified that she did not give Appellant a copy of the order and that Appellant did not believe what she told him. According to Ms. Davidson's own testimony, Appellant's response to her informing Appellant that she had a court order was, "That can't be possible." Appellant was never told more about the order by Ms. Davidson, or anyone else. It is inconceivable the 6th Court of Appeals found the evidence sufficient to uphold a finding that Appellant knew, beyond a reasonable doubt, that 1. an order existed and, 2. what the express terms of the order were when the solitary piece of information he received, from a CPS employee that he didn't trust, was that a custody order existed. A conviction cannot be upheld for knowingly violating the express terms of an order when Appellant was never made aware of what the express terms of the order were. And the State's own witness testified that Appellant did not know what the express terms of the order were.

At trial, the State alleged that Appellant actively tried to avoid service. This allegation was entirely unsupported by the record as there was no evidence presented of any efforts the Department made to try to have Appellant served. The Department did not send a process server out to attempt to serve Appellant. The Department did not send a constable out to attempt to serve Appellant. The Department did not mail the order to Appellant at his residence. The Department did not even, as often happens with process servers, leave a copy on the ground in front of Appellant's

door so that he could read the order. In short, the Department did nothing to attempt to have Appellant served. At trial, witnesses for the State said they did not attempt to serve Appellant because they did not think their efforts would be successful. To be quite blunt, that's just not good enough. A CPS worker's opinion as to whether or not attempted service would be successful is not an excuse for the State to wholly fail to follow the rules of civil procedure, and then to hold Appellant criminally liable for violating an order when he has no idea what is contained in the order. It is inexcusable for the State to allege that Appellant attempted to avoid service when the State made zero efforts to have Appellant served.

However, even if the allegations ***were*** true that Appellant avoided service, which Appellant does not admit, Appellant's attorney on appeal would respond with the very eloquent argument of; So what? Whether or not Appellant avoided service has absolutely no bearing on whether or not appellant knowingly violated the express terms of a court order. That issue is irrelevant to the fact question to be decided and were just presented as an emotional argument to inflame the jury.

Challenges to the sufficiency of the evidence are reviewed under the standard enunciated in *Jackson v. Virginia,* 443 U.S. 307, 318–20, 99 S.Ct. 2781, 2788–89, 61 L.Ed.2d 560 (1979). *Brooks v. State,* 323 S.W.3d 893, 894–913 (Tex.Crim.App.2010). Under the *Jackson* standard, evidence is insufficient to support a conviction if, considering all the record evidence in the light most

favorable to the verdict, no rational factfinder could have found that each essential element of the charged offense was proven beyond a reasonable doubt. *See Jackson,* 443 U.S. at 317–19, 99 S.Ct. at 2788–89; *Laster v. State,* 275 S.W.3d 512, 517 (Tex.Crim.App.2009). Evidence is insufficient under four circumstances: (1) the record contains no evidence probative of an element of the offense; (2) the record contains a mere "modicum" of evidence probative of an element of the offense; (3) the evidence conclusively establishes a reasonable doubt; or (4) the acts alleged do not constitute the criminal offense charged. *See Jackson,* 443 U.S. at 314, 318 & n. 11, 320, 99 S.Ct. at 2786, 2788–89 & n. 11; *Laster,* 275 S.W.3d at 518; *Williams v. State,* 235 S.W.3d 742, 750 (Tex.Crim.App.2007). Courts consider both direct and circumstantial evidence and all reasonable inferences that may be drawn from that evidence in making a determination. *Clayton v. State,* 235 S.W.3d 772, 778 (Tex.Crim.App.2007).

If an appellate court finds the evidence insufficient under this standard—meaning that no rational factfinder could have found that each essential element of the charged offense was proven beyond a reasonable doubt—it must reverse the judgment and enter an order of acquittal. *See Tibbs v. Florida,* 457 U.S. 31, 41, 102 S.Ct. 2211, 2218, 72 L.Ed.2d 652 (1982); *Jackson,* 443 U.S. at 317–19, 99 S.Ct. at 2788–89.

The relevant facts are clear and uncontroverted; Appellant was never served with the order at issue in this case. The record is further clear and uncontroverted that Appellant was never given a copy of the order. The record is clear and uncontroverted that Appellant was never told the contents of the order. The only evidence in this case that Appellant had any knowledge that an order even existed is one CPS workers testimony who says she told Appellant she had a court order, but who further says Appellant didn't believe her. On cross-examination that witness admitted that she did not tell Appellant any of the details of the order. There is absolutely no evidence in the record that Appellant knew any of the "express terms" of the order that he was convicted of violating. As the San Antonio court held in *Small v. State*, Appellant could not violate an order he knew nothing about. Appellant's knowledge is a necessary element of the offense, and the State's failure to establish this element results in this conviction being unsupported.

Although the law is clear that a defendant is presumed to know statutory law, the State cannot convincingly argue that a defendant is presumed to know what every court order issued prohibits. The State did not satisfy its obligation, as alleged, by simply establishing that other persons surrounding the investigation had the opinion that Appellant knew a court order existed. In order to uphold their conviction, the State would have to prove that Appellant knowingly and intentionally violated the express terms of that order. This the State wholly failed to do.

The State contends that, because a CPS investigator, whom the testimony clearly shows Appellant did not trust, testified she told Appellant she had a court order, and because a police officer or two believed Appellant knew there was an order, that Appellant is then presumed to have knowledge of the detailed terms contained in that court order. To conclude so would amount to nothing more than speculation and surmise. The jury is "not permitted to come to conclusions based on mere speculation or factually unsupported inferences or presumptions." *Hooper*, 214 S.W.3d at 15.

The 6th Court of Appeals Court of Appeals erred in finding the evidence legally sufficient to prove beyond a reasonable doubt that Appellant knowingly violated the express terms of an order as the record is crystal clear that Appellant was never informed in any manner of the express terms of the order he has been convicted of violating. The 6th Court states that intent can be inferred by acts done. But Appellant's actions are just as keeping with an innocent person who simply doesn't wish to cooperate with CPS. There is nothing in Appellant's actions that can be inferred to show that he knew the express terms of any order. At best, the record, including the inferences drawn from Appellant's actions, supports a finding that Appellant knew there was an investigation. There is nothing in the record to support the 6th Court's holding that the evidence is sufficient to find that Appellant **knew** "the order granted sole custody of the child to the Department." No facts in the

record support any holding that Appellant was made aware of any such terms. The lengths to which the 6th Court had to reach to support this jury verdict are beyond merely viewing the evidence in the light most favorable to the verdict and extend to rewriting the facts presented at trial.

In *Walker v. State*, No. PD-1429-14, 2016 Tex. Crim. App. Unpub. LEXIS 973 (Tex. Crim. App. 2016) (not designated for publication), this Court notes that "…[a] conviction that is based upon juror speculation raises only a suspicion of guilt, and mere suspicion is inadequate to satisfy the constitutional sufficiency standard that requires proof beyond a reasonable doubt. *Id.* at *25, citing *Winfrey*, 323 S.W.3d at 882. As in *Walker,* a careful consideration of the facts leads to the conclusion that a rational jury would have had, at most, only a suspicion of guilt under these circumstances, which required the 6th Court to hold the evidence insufficient and render a judgment of acquittal.

The 6th Court erred in upholding Appellant's conviction because the evidence simply cannot prove that Appellant intentionally and knowingly violated the express terms of a court order because there is absolutely no evidence to support that finding. It is not enough for others to testify that it was their opinion that Appellant knew. It is not sufficient to show that Appellant merely thought that an order may have existed. The evidence must show conclusively that Appellant *actually knew* the express terms of the order and knowingly violated said terms. As the evidence

introduced at trial in this case wholly fails to support such a finding, the 6th Court erred in finding that the evidence was legally sufficient to uphold the jury's verdict. Appellant respectfully asks this Court to correct this error and reverse and enter a judgment of not guilty.

The evidence in this case does not even prove beyond a reasonable doubt that Appellant knew an order even existed. But, for the sake of argument, even if this court finds that the testimony presented by the State proves beyond a reasonable doubt that Appellant knew an order existed, the evidence is still insufficient to find Appellant guilty of the charge as indicted because the record is completely and totally void of any evidence that Appellant knew what the express terms of the order were. And, as stated in *Small v. State*, unless Appellant is somehow aware of what he is prohibited from doing by a specific court order, he cannot be guilty of knowingly and intentionally violating that court order.

XII. Conclusion and Prayer

For these reasons, the Court of Appeals erred by affirming the Judgment and sentence and Appellant respectfully prays that this Court reverse the *Judgment* and sentence, and enter a judgment of acquittal.

Respectfully submitted,

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XIII. Certificate of Services

I certify that on February 17, 2020, a true and correct copy of this redacted document was served on Hunt County District Attorney Nobie Walker by Texas efile to nwalker@huntcounty.net, and on Stacey Soule, by Texas efile to stacey.soule@spa.texas.gov, and information@spa.texas.gov. See Tex. Rule App. Proc. 9.5 (2017) and Tex. Rule App. Proc. 68.11 (2017).

XIV. Certificate of Compliance with Tex. Rule App. Proc 9.4

I certify that this document complies with: (1) the type-volume limitations because it is computer-generated and does not exceed 15,000 words. Using the word-count feature of Microsoft Word, this document contains 4938 words and (2) the typeface requirements because it has been prepared in a proportionally-spaced typeface using Microsoft Word in 14-point font. *See* Tex. Rule App. Proc. 9.4 (2017).

/s/Jessica McDonald
Jessica McDonald

2019 WL 2292334
Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR DESIGNATION AND SIGNING OF OPINIONS.

Do Not Publish
Court of Appeals of Texas, Texarkana.

Michael Anthony HAMMACK, Appellant
v.
The STATE of Texas, Appellee

No. 06-18-00212-CR
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Submitted: May 29, 2019
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Decided: May 30, 2019
|
Discretionary Review Granted November 6, 2019

On Appeal from the 354th District Court, Hunt County, Texas, Trial Court No. 32355CR

Attorneys and Law Firms

Jessica McDonald, for Michael Anthony Hammack.

Noble D. Walker Jr., Christopher Bridger, for The State of Texas.

Before Morriss, C.J., Burgess and Stevens, JJ.

MEMORANDUM OPINION

Memorandum Opinion by Chief Justice Morriss

***1** During Michael Anthony Hammack's Hunt County jury trial on a charge of interfering with child custody, Rhonda West, investigator with the Texas Department of Family and Protective Services (Department), testified that she and another Department investigator, Amber Davidson, went to Hammack's residence to attempt to serve an Order of Protection of a Child in an Emergency (Order) dated February 27, 2018, that awarded custody of Hammack's child to the Department. At the residence, Davidson explained to Hammack that, pursuant to the Order, they were there to take custody of the child. Davidson testified that Hammack understood such result from the Order, became aggressive, and ordered them off the property. Davidson and West departed, but then took custody of the child at the child's school with the assistance of a peace officer and telephoned Hammack to tell him that the Department (1) had obtained custody of the child as a result of the Order and (2) had thus picked her up at school. The child managed to escape from the Department's possession and was later, temporarily, secreted by Hammack.

As a result, Hammack was convicted of interfering with child custody, sentenced to two years' confinement in state jail, and fined $ 10,000.00. The sentence was suspended and Hammack was placed on five years' community supervision. As a condition of Hammack's community supervision, the trial court ordered him confined to jail for 180 days. [1]

In his sole point of error on appeal, Hammack claims the evidence was legally insufficient to prove he knew he was violating the terms of a judgment or order when he secreted the child. Because we find the evidence legally sufficient to support the conviction, we affirm the trial court's judgment.

In evaluating legal sufficiency of the evidence, we review all the evidence in the light most favorable to the trial court's judgment to determine whether any rational jury could have found the essential elements of the offense beyond a reasonable doubt. *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010) (plurality op.) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); *Hartsfield v. State*, 305 S.W.3d 859, 863 (Tex. App.—Texarkana 2010, pet. ref'd). We examine legal sufficiency under the direction of the *Brooks* opinion, while giving deference to the responsibility of the jury "to fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) (citing *Jackson*, 443 U.S. at 318–19); *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007).

Legal sufficiency of the evidence is measured by the elements of the offense as defined by a hypothetically correct jury charge. *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). The "hypothetically correct" jury charge is "one that accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried." *Id.*

***2** A person commits the state jail felony of interfering with child custody if he or she takes or retains a child "when the person knows that the person's taking or retention violates the express terms of a judgment or order, including a temporary order, of a court disposing of the child's custody." TEX. PENAL CODE ANN. § 25.03(a)(1), (d). Hammack does not contest the fact that he secreted the child in violation of the terms of a temporary order. Instead, he challenges the jury's finding that he had knowledge of the order. While it is the State's burden to prove the element of knowledge beyond a reasonable doubt, knowledge "can be inferred from the acts, words, and conduct of the accused." *Louis v. State*, 329 S.W.3d 260, 269 (Tex. App.—Texarkana 2010), *aff'd*, 393 S.W.3d 246 (Tex. Crim. App. 2012); *see Charlton v. State*, 334 S.W.3d 5, 12 (Tex. App.—Dallas 2008, no pet.) (citing *Hart v. State*, 89 S.W.3d 61, 64 (Tex. Crim. App. 2002)).

The State indicted Hammack for taking or retaining his child "when the said defendant knew [the retention of the child] ... violated the express terms of ... [an] Order of Protection of a Child in an Emergency." Hammack stipulated that this Order granted the Department the temporary sole managing conservatorship and "the sole right of possession and physical custody" of the child until the March 9, 2018, temporary hearing. A writ of attachment securing the child's possession in favor of the Department was also issued.

At trial, Hammack established that he was never served with the Order. However, the jury was presented with other evidence suggesting his knowledge about its contents.

This record contains the above evidence of the Department's attempt to serve and execute the Order at Hammack's residence and the follow-up telephone call to Hammack. Also, during the call, Hammack reportedly questioned how Davidson had obtained the Order, and, when Davidson replied with the name of the judge who signed the Order, Hammack said, "[T]hat can't be possible because I only work with a different judge." Davidson testified that, as a result of their telephone conversation, Hammack understood the Order and knew that the Department had obtained custody of the child. Davidson asked Hammack to meet her at the office to discuss the situation, but Hammack did not comply. It was after this telephone conversation that the child escaped from the Child Protective Services (CPS).

Kelvin Gene Rhodes, Jr., an officer with the Commerce Police Department (CPD), testified that he was asked to help locate the child. According to Rhodes, the Department believed that the child was at Hammack's house. Rhodes and CPS workers travelled to Hammack's home, but he told them he had not seen the child. Rhodes informed Hammack that the child was "missing from the custody of [the Department]." In Rhodes' opinion, Hammack was not surprised by this information and knew the child was supposed to be with the Department. Rhodes' search of the home revealed that the child was not there.

Alvarado Torres, another investigator with the Department, testified that, shortly after Rhodes confronted Hammack at his house, he saw the child, the child's boyfriend, and Hammack walk into Hammack's mother's house. Torres called the local police and waited outside. A police officer, Marcus Cantera, testified that he arrived at the house and spoke with Hammack's mother, Linda Hammack. Cantera testified that he told Linda that the child escaped from the Department after the writ of attachment was executed. In searching Linda's home, Cantera heard people talking in the attic and found Hammack on a ladder leading to the attic. Cantera testified that Hammack began yelling and accusing Cantera of violating his constitutional rights. On witnessing the confrontation, Linda recanted her prior consent to Cantera's search of the house. Cantera left, even though he heard people in the attic. He added that Hammack followed him outside and saw Torres' vehicle waiting to transport the child if found. According to Cantera, Hammack "was told about the order before [Cantera] got there" and knew that the Department had temporary custody of the child.

***3** The child was found in Hammack's home on March 6.[2] Davidson and Laura Sumner, the clerk for Choctaw County, Oklahoma, testified that Hammack brought the pregnant child to Oklahoma and consented to her marriage to her older boyfriend on March 5. A copy of the marriage certificate containing Hammack's signature was presented to the jury.

We conclude the evidence is legally sufficient to support the jury's finding that Hammack knew (1) the Order existed, (2) it granted sole custody of the child to the Department, (3) the Department had obtained a writ of attachment to secure the child, and (4) his possession of the child violated the Order. Although he was not formally served with the Order, West, Davidson, Rhodes, and Cantera testified Hammack was notified about the Order and knew the Department had obtained custody of the child. Davidson testified she again told Hammack that the Department had obtained custody of the child after the child was escorted to the CPS office. When the child went missing, Torres saw her, the boyfriend, and Hammack enter, but not exit, Linda's home. This testimony, combined with Cantera's testimony, showed that Hammack was at least participating in the child being secreted in Linda's attic. From this evidence, the jury could infer that Hammack knew he was violating the terms of the Order by possessing the child.

We find the evidence legally sufficient to support the jury's verdict of guilt. Accordingly, we overrule Hammack's sole point of error.

We affirm the trial court's judgment.

All Citations

Not Reported in S.W. Rptr., 2019 WL 2292334

Footnotes

1 The trial court also ordered Hammack to pay $ 3,320.00 in attorney fees for his court-appointed counsel. Hammack informed the trial court that he could afford to pay $ 100.00 in attorney fees per month.

2 According to Torres, the child escaped CPS offices again on March 6.